

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
	:	
of	:	
	:	
IRVING AND DIANE EISENBERG	:	DETERMINATION
	:	DTA NO. 818071
for Redetermination of a Deficiency or for Refund of New	:	
York State Personal Income Tax under Article 22 of the	:	
Tax Law for the Years 1991, 1992 and 1993.	:	

Petitioners, Irving and Diane Eisenberg, 45 Silas Carter Road, Manorville, New York 11949, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 1991, 1992 and 1993.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, State Office Building, Veterans Memorial Highway, Hauppauge, New York on November 15, 2001 at 9:15 A.M. Petitioner Irving Eisenberg appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Mac Wyszomirski and Susan Parker).

Since neither party herein elected to reserve time to file a posthearing brief, the three-month period for the issuance of this determination began as of the date the hearing was held.

ISSUE

Whether the Division of Taxation properly denied petitioners' claims for refund for the three years at issue on the ground that each claim was filed after the statute of limitations for refund had expired.

FINDINGS OF FACT

1. Petitioners herein, Irving and Diane Eisenberg, jointly filed New York State resident income tax returns for the years 1991, 1992 and 1993 on March 19, 1999. All three returns claimed that petitioners were due a refund and the following chart details how the overpayment on each return was computed:

	<u>1991</u>	<u>1992</u>	<u>1993</u>
New York State tax withheld	\$1,187.00	\$24.00	\$1,622.00
Tax due per return	<u>170.00</u>	<u>-0-</u>	<u>337.00</u>
Refund	\$1,017.00	\$24.00	\$1,285.00

2. On October 1, 1999, the Division of Taxation ("Division") issued a Notice of Disallowance to petitioners advising them that the refunds claimed on the 1991, 1992 and 1993 tax returns had been denied in full. The basis for the denial, as stated in the Notice of Disallowance, was that "the deadline for filing for a refund or credit expired three years from the date the return was due."

3. In 1989 petitioner Diane Eisenberg became ill and as the illness progressed she became completely disabled. On November 11, 1995, after significant hospitalization and nursing home care, Diane Eisenberg died as the result of complications due to diabetes. On January 16, 1995, petitioner Irving Eisenberg sustained an injury which subsequently led to permanent disability. Petitioners' respective disabilities ultimately forced them into bankruptcy. As the result of their health and financial problems petitioners did not file their 1991, 1992 and 1993 Federal and New York State income tax returns on or before the respective due dates, nor did they file for extensions of time to file said returns.

4. Petitioners' Federal income tax returns for the years 1991, 1992 and 1993 were prepared and filed with the Internal Revenue Service on or about January 24, 1995. These

returns were mailed via ordinary first-class mail either from petitioners' home address or from the local post office. Petitioner Irving Eisenberg asserts that the New York State personal income tax returns for 1991, 1992 and 1993 were prepared at the same time that the Federal returns were prepared and mailed. Mr. Eisenberg testified that the New York State returns for these three years would have been mailed in the same manner as the Federal returns, i.e., by ordinary first-class mail.

5. In light of petitioners' contention that New York State personal income tax returns for 1991, 1992 and 1993 were mailed on or about January 24, 1995, the Division has made several searches of its records in an effort to locate these returns. The Division was unable to find any record of the 1991, 1992 and 1993 New York State personal income tax returns allegedly mailed by petitioners on or about January 24, 1995.

6. When petitioner Irving Eisenberg mailed the New York State personal income tax returns on March 19, 1999 he also attached a letter which indicated that he was enclosing returns for the years 1991 through 1995.¹ Said letter states, in pertinent part, "I am writing this letter to inform you that the reason for the delay in my submitting these New York State Income Tax returns for the above years is due. . . ." The letter proceeds to chronicle the illnesses which petitioners endured through those five years. The letter also indicates that, "With regard to the 1994 return, the enclosed is a copy, since I did send in that one on April 14, 1998, as you will see from the date on the back. I am enclosing a copy, with another copy of the W-2 form as well." The returns filed on March 19, 1999 for 1991, 1992 and 1993 are not photocopies and all three appear to be original returns.

¹ The returns for the years 1994 and 1995 are not at issue in this proceeding.

CONCLUSIONS OF LAW

A. As relevant to this proceeding, Tax Law § 687, entitled “Limitations on credit or refund” provides as follows:

(a) General. --- Claim for credit or refund of an overpayment of income tax shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later. . . . If the claim is filed within the three year period, the amount of the credit or refund shall not exceed the portion of the tax paid within the three years immediately preceding the filing of the claim plus the period of any extension of time for filing the return. . . .

For all three years at issue petitioners’ only payment of taxes was via tax withheld from wages. Pursuant to Tax Law § 687(i) income taxes withheld from wages are deemed to have been paid by a taxpayer on April 15th of the following year. Accordingly, in order to be entitled to a refund of any of the tax withheld from their wages, petitioners would be required, pursuant to Tax Law § 687(a), to file a claim for such refund of tax withheld by April 15, 1995 for the 1991 tax year; by April 15, 1996 for the 1992 tax year and by April 15, 1997 for the 1993 tax year.

B. Tax Law § 691(a) provides, in pertinent part, that:

If any return . . . required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date . . . is, after such period or such date, delivered by United States mail . . . the date of the United States postmark stamped on the envelope shall be deemed to be the date of delivery. . . . If any document or payment is sent by United States registered mail, such registration shall be prima facie evidence that such document or payment was delivered to the tax commission, bureau, office, officer or person to which or to whom addressed.

When the Division fails to receive a document, the general rule is that proof of ordinary mailing is insufficient as a matter of law to prove timely filing (*Matter of Reeves*, Tax Appeals Tribunal, August 22, 1991; *Matter of Savadjian*, Tax Appeals Tribunal, December 28, 1990;

Matter of Filler, Tax Appeals Tribunal, August 24, 1989; *Matter of WSD United Transp.*, Tax Appeals Tribunal, July 27, 1989).

C. In the instant matter, the Division has established that it has no record of receiving the New York State personal income tax returns for the years 1991, 1992 and 1993 which were purportedly mailed by petitioners on or about January 24, 1995. The Division's records reflect that the first time it received petitioners' returns for 1991, 1992 and 1993 was on March 19, 1999. Accordingly, the burden is on petitioners to prove (Tax Law § 689[e]), by one means or another, that they filed the returns for 1991, 1992 and 1993 with the Division before the statute of limitations for refund had expired. Petitioner Irving Eisenberg's testimony concerning the preparation and mailing of the 1991, 1992 and 1993 returns, although forthright and sincere, is not sufficient to permit a conclusion that petitioners have met their burden of proving that the returns for the three years at issue were first filed on or about January 24, 1995 (*see, Matter of Miller v. United States*, 784 F2d 728, 86-1 US Tax Cas ¶ 9261; *Matter of Sipam*, Tax Appeals Tribunal, March 10, 1988 [for a general discussion on the filing of various documents with the Division and the Division of Tax Appeals]). Petitioners could have avoided any risk of mishandling of the returns by the Postal Service or by the Division had they used certified or registered mail (Tax Law § 691[a]; 20 NYCRR former 146.4[c]), since certification or registration serves as prima facie evidence that a document or payment was delivered. However, petitioners chose to mail their 1991, 1992 and 1993 returns using ordinary first class mail and therefore they bear the risk of nondelivery or mishandling.

D. The petition of Irving and Diane Eisenberg is denied and the Division's Notice of Disallowance dated October 1, 1999 is hereby sustained.

DATED: Troy, New York
December 27, 2001

/s/ James Hoefer
PRESIDING OFFICER